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IN THE

Supreme Court of the United States

October Term, 1948

No. 605

J. C. ANDEREGG,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

On Petition For a Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit.

REPLY BRIEF ON BEHALF OF PETITIONER

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

With all deference to the reasoning of the Honorable Solicitor General, it is not perceived why the express man-

date of the law to the effect that in tort claims suits the "United States shall be liable in respect of such claims in the same manner and to the same extent as a private individual under like circumstances" (the words found in the Federal Tort Claims Act of August 2, 1946, Sec. 410(a) being reenacted *verbatim* in the present Section 2674 of the Judicial Code) must be limited in its application to only "some aspects of tort claims" (Br. in Opposition, p. 7), excluding from its application the limitations provision under consideration. The authorities cited (Br. in Opposition, pp. 6, 7) do not support any such contention. *Finn* v. *United States*, 123 U. S. 227, *United States* v. *Michel*, 282 U.S. 656, and *Munro* v. *United States*, 303 U.S. 36, have been noticed earlier. Estoppel to plead the statute of limitations was not involved in *United States* v. *Seminole Nation*, 299 U.S. 417. Both *United States* v. *United States Fidelity Co.*, 309 U.S. 506, and *United States* v. *Sherwood*, 312 U.S. 584, dealt with a want of statutory jurisdiction of subject-matter.

The petitioner has always conceded that if immunity under all circumstances springs up again upon the expiration of the period of time mentioned in the limitations provision of the Federal Tort Claims Act, then jurisdiction of suits under that Act disappears along with the end of the waiver of immunity and no grounds of equitable estoppel could take the place of an Act of Congress so as to make jurisdiction exist. However, the petitioner's attempted distinction between the language of this Act and that of Acts wherein the limitation is upon the bringing of suit, and, therefore, upon jurisdiction, has so far gone unanswered, it is believed. If this distinction be an untenable one, it should be so announced by a decision of this

Court. It certainly is sufficiently debatable to be the possible source of much divided opinion throughout the country in this important field of Federal law. In this city, where this little case has caused some considerable discussion among lawyers, the majority view seems to be that the status of the United States in a tort claims case is that of a private individual and that it should be estopped to plead the statute of limitations whenever a private individual would be so estopped. Doubtless this view, correct or erroneous, might be found to exist wherever the question should arise.

The rule that "Men must turn square corners when they deal with the Government" (quoted again in *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380, 385), is, or should be, well known, but that rule merely means than an agent of the Government cannot, without actual authority, bind it, or surrender or bargain away a public right. It has never been extended to mean that an agent of the Government is at complete liberty to defeat a just claim for compensation through suit authorized by Congress by conduct which would give rise to an estoppel in the case of a private individual.

If the petitioner be correct in asserting that the status of the United States in a case of this kind is that of a private individual, then there would seem to be little doubt that it, as distinguished from such private individual, is subject to the doctrine of equitable estoppel. Where by Act of Congress the Government has come down from its position of sovereignty and subjected itself to the same rules as a private citizen the principles of equity apply to it, including that of estoppel. *The Falcon,* D. C.-Md., 19 F. (2d) 1009, 1013, 1014. If the petitioner be in error concerning that contention, but correct in asserting that the

limitation provision contained in the Federal Tort Claim Act is an ordinary statute of limitation, as distinguished from a condition upon the right to sue, referring to jurisdiction and immunity, then we are left in a field where there is no sure guide of precedent.

In what appears to be an exhaustive and learned Note entitled "Governmental Immunities—A Study in Misplaced Solicitude", published in Vol. 16, University of Chicago Law Review, page 128 (Autumn 1948, No. 1), it is stated that *Lee* v. *Munroe and Thornton*, 7 Cranch (U.S.) 366, is the only case before this Court involving "a clear estoppel situation" (at p. 135). But even that case is not entirely in point here.

Where the United States is the plaintiff, the doctrine of estoppel has been held applicable to it. In this connection a case somewhat in point here is *United States* v. *Coast Wineries*, 9 Cir., 131 F. 2d 643, where it was held that the Government was estopped to maintain an action against a bankrupt's surety for tax monies, its agents having mislead such surety into refraining from presenting within the statutory time a creditor's claim against the indemnitor's estate. No reason is perceived why the same rule should not apply when the United States is sued pursuant to an Act of Congress containing a broad waiver of immunity.

Respectfully submitted,

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